

**BEFORE THE
NATURAL RESOURCES COMMISSION
OF THE
STATE OF INDIANA**

IN THE MATTER OF:

RULE TO HELP IMPLEMENT P.L. 151-2012)	Administrative Cause
(IC 14-25-1-8) TO MEDIATE DISPUTES)	Number: 12-060W
AMONG SURFACE WATER USERS)	(LSA Document #12-554(F))

**REPORT ON RULE PROCESSING, PUBLIC HEARING, AND HEARING OFFICER
ANALYSES WITH RECOMMENDATIONS REGARDING FINAL ADOPTION**

1. RULE PROCESSING

For consideration is proposed 312 Ind. Admin. Code § 11.8 to assist with implementation of IC 14-25-1-8, as amended by P.L. 151-2012, to identify a process for mediation of disputes among surface water users. The process would be initiated when a person sought access to mediation through the Natural Resources Commission, Division of Hearings, and would include technical support from the Department of Natural Resources, Division of Water. Neither a mediator nor an agency can impose a resolution, but the parties to mediation can agree to enter a binding agreement. The agreement can be entered privately among the parties or can be implemented through an agreed order of the Commission.

The Commission gave preliminary adoption to 312 IAC § 11.8 on September 18, 2012. As reported in the pertinent portions of the September 18 minutes:

Consideration of preliminary adoption of 312 IAC 11.8 to assist with implementation of P.L. 151-2012, which amended IC 14-25-1-8, pertaining to the mediation of disputes between the users of surface water; Administrative Cause No. 12-060W

Steve Lucas...presented this item. He said since 1955 the "Water Rights Act" authorized "the mediation of disputes which could arise from too much water or too little water." The provision is currently codified at IC 14-25-1-8. The Division of Hearings has received sporadic inquiries about the use of the mediation provision. "It doesn't come up every year, but in my tenure, it has come up perhaps a dozen times. It was usually when there was a drought." When he "walked through the former provision with people, they would never choose to use it. The reason, I think, is because the statute said you could go through this whole process and in the end you could have an agreement, but the agreement wasn't binding."

Lucas said in 2012, the General Assembly amended IC 14-25-1-8 and caused the Administrative Orders and Procedures Act provisions regarding mediation [IC 4-21.5-3.5] to apply in disputes between users of surface water. "If you got to the end of the process, and the participants signed an agreement, the agreement would be binding."

Lucas acknowledged the Division of Water has had concerns the proposed rule might be abused. "I appreciate their efforts and those of Ron McAhron...in trying to come up with something that we hope will work and will provide a smooth process going forward." If the Commission gives preliminary adoption, "we'll go to public hearing and see what citizens have to say."

Kent Abernathy asked, "Where do the mediators come from?"

Lucas explained that Sandra Jensen and he are mediators who have completed training approved by the Indiana Supreme Court. "There are other agencies that work with the Commission's Division of Hearings, such as the Office of Environmental Adjudication, that have registered mediators. A person using the proposed rule would not be required to use a mediator employed by the State, however, but could use a mediator from the private sector." He said as a Commission ALJ, he has "encouraged persons as a first choice to seek a mediator from their own community. But persons may also choose a registered mediator from a State program called the 'Shared Neutrals Program'. These options would also apply to the proposed rule."

Abernathy asked, "Is there still an appeals process? Would they appeal it to an administrative law judge?"

Lucas answered, "This context is extraordinary. An administrative law judge would take Jurisdiction" to bring the parties together, and then the dispute would go to mediation. "If the parties were successful and came to an agreement, then that agreement could be a private agreement that the agency would never see. It could be an agreed order. In latter instance, it would be approved by the administrative law judge and by the Secretary of the Commission, who is Rob Carter at this time. The parties could fail to come to an agreement..., and the mediator would report back [to the administrative law judge] that there was an impasse. The administrative law judge would say 'we're done,'" and the proceeding would be dismissed. "That's not typical of how mediation works under AOPA, but it's a limitation that would apply in this context." If mediation is unsuccessful, the proceeding would be dismissed.

Kent Abernathy moved to give preliminary adoption of 312 IAC 11.8 to assist with implementation of P.L. 151-2012, which amended IC 14-25-1-8, pertaining to the mediation of disputes between the users of surface water. R.T. Green seconded the motion. Upon a voice vote, the motion carried.

The "Notice of Intent" to adopt 312 IAC § 11.8 was posted to the INDIANA REGISTER at 20121010-IR-312120554NIA on October 10, 2012. The notice identified Stephen Lucas as the "small business regulatory coordinator" for purposes of IC § 4-22-2-28.1.

As specified by the Executive Order that then applied, proposed fiscal analyses of the rule proposal were submitted, along with a copy of the proposed rule language and a copy of the posted Notice of Intent, to the Office of Management and Budget on October 11, 2012. In a letter dated November 19, 2012, Adam M. Horst, Director, Office of Management and Budget, recommended that the proposed rule amendments be approved.

On November 21, 2012, the Division of Hearings submitted the rule proposal to the Legislative Services Agency, along with the “Statement Concerning Rules Affecting Small Business” (also known as the “Economic Impact Statement”). The Notice of Public Hearing was submitted to the Legislative Services Agency on November 29, 2012. On December 5, 2012, the following were posted to the INDIANA REGISTER: the text of the proposed rule at 20121205-IR-312120554PRA; the notice of public hearing along with the justification statement (IC 4-22-2-24(d)(3)) at 20121205-IR-312120554PHA; and the Economic Impact Statement at 20121205-IR-312120554EIA. Following receipt of an “Authorization to Proceed” from the Legislative Services Agency on November 29, 2012, the Division of Hearings caused a Notice of Public Hearing to be published by the Indianapolis Newspapers in the Indianapolis *Daily Star*, a newspaper of general circulation in Marion County Indiana, on December 14, 2012. In addition, the Commission’s rulemaking docket (<http://www.in.gov/nrc/2377.htm>) was updated to include links to the published rule proposal, notice of the public hearing, and other information required by IC § 4-22-2-22.5.

The Statement Concerning Rules Affecting Small Businesses (the “EIS”), as required under IC § 4-22-2.1-5, and submitted by the Small Business Regulatory Coordinator, indicates:

Economic Impact Statement
LSA Document #12-554

IC 4-22-2.1-5 Statement Concerning Rules Affecting Small Businesses

Estimated Number of Small Businesses Subject to this Rule:

312 IAC 11.8 would help implement Public Law 151-2012, which amends IC 14-25-1-8, and that provides for the use of mediation to resolve disputes regarding the existence or use of surface water. The rule would apply as a voluntary last resort short of litigation. The rule would clarify that it is available for instances in which the Department of Natural Resources has jurisdiction pertaining to water quantity-in other words, does not apply to matters of water quality under IDEM jurisdiction. For instances in which legislation has otherwise made specific provision for dispute resolution, the rules would require their exhaustion before resort to this remedy. These are through:

- (1) a local unit of government to address a storm water nuisance ([IC 36-9-27.4](#));
- (2) a county drainage board to address obstructions in a mutual drain ([IC 36-9-28.7](#)); and
- (3) disputes among competing riparian owners within public freshwater lakes ([IC 14-26-2-23](#)).

The number of small businesses that could be involved in a dispute regarding surface water is substantial. Surface water disputes arise most typically where there is excess water (as in a flood) or as a result of a drought. Because the legislation authorizing the relief is novel, estimating the number of uses is difficult. Usage is also weather dependent and could become more frequent-as during a sustained drought.

Both in its current form and as [IC 14-25-1-8](#) existed prior to the amendments in P.L.151-2012, the Natural Resources Commission had responsibility for its implementation. The Division of Hearings is the point of contact for the Commission on a daily basis. Over the past 30 years, the Division of Hearings has never received more than a half dozen inquiries concerning the use of [IC 14-25-1-8](#) in a single year. Perhaps half of these would involve a small business. Typically, inquiries were received during droughts.

The remedy afforded by [IC 14-25-1-8](#) seems more attractive since P.L.151, so there may be greater interest in the future. But no inquiries have been received in 2012, even during a serious drought. The best estimate is that not more than six usages of [IC 14-25-1-8](#), as implemented through proposed [312 IAC 11.8](#), would occur in a single year. Perhaps half of these six uses would involve a small business. As likely as not, a small business would be seeking the relief afforded by the statute and rule.

Estimated Average Annual Reporting, Record Keeping, and Other Administrative Costs Small Businesses Will Incur for Compliance:

There is no annual reporting, record keeping, or administrative costs associated with the proposed rule.

Estimated Total Annual Economic Impact on Small Businesses to Comply:

None. Resolving a dispute requires good-faith participation by the parties. In the sense that dispute resolution requires a human expenditure and time, there would be a cost. But this cost is a consequence of [IC 14-26-1-8](#). As likely as not, a small business would be initiating an effort at resolution, and mediation is generally believed to be less costly than litigation. Neither the DNR nor the Commission would impose a cost.

Justification Statement of Requirement or Cost:

Not applicable.

Regulatory Flexibility Analysis of Alternative Methods:

The Commission could remain silent concerning how to implement [IC 14-25-1-8](#). Silence would invite a process that would be more open-ended and likely more costly than the focused approach set forth in proposed [312 IAC 11.8](#).

Dispute resolution through mediation requires and a human expenditure and time. In this sense, IC § 14-26-1-18, as amended, involves cost. But a successful mediation can achieve resolution without the costs associated with litigation. An agreed resolution is likely to be more palatable to the parties than one imposed through adjudication. Because there was no additional

requirement or cost resulting from proposed 312 IAC § 11.8, the proposal was not submitted to the Indiana Economic Development Commission.

2. PUBLIC HEARING

A public hearing was convened as scheduled on February 1, 2013 to consider proposed 312 IAC § 11.8. No member of the public attended, and no comments were received by mail, online, or otherwise. The comment period was closed on February 6, 2013.

3. HEARING OFFICERS ANALYSES WITH RECOMMENDATIONS REGARDING FINAL ADOPTION

Since 1955, the Indiana General Assembly required, through IC § 14-25-1-8 and its statutory antecedents, for the Commission (and its antecedents) to provide a forum for the mediation of surface water disputes. Infrequently during the past ten or 20 years, and most typically during droughts, citizens inquired concerning use of the remedy. The statutory language was archaic, and even if participants came to an agreement, the statute provided the agreement was not binding. Citizens determined use of the remedy was infeasible.

With P.L. 151-2012, the General Assembly modernized IC § 14-25-1-8 to incorporate IC § 4-21.5-3.5 as the general mediation standard. But the method for implementation was left to the Commission. Proposed 312 IAC § 11.8 would specify that a request for mediation is made to the Commission's Division of Hearings. The DNR's Division of Water would provide technical support. Upon a citizen request for mediation, the proposed rule would cause the appointment of a Commission administrative law judge, and another person would be chosen to serve as mediator. To avoid duplication of efforts, the mediation process in the rule would defer to other more-specific statutory processes for dispute resolution. These are for disputes regarding: (1) competing riparian or public rights within a public freshwater lake (IC § 14-26-2 and 312 IAC § 11); (2) obstructions in mutual drains and natural surface watercourses (IC § 36-9-27.4); and storm water nuisances (IC § 36-9-28.7). A person seeking mediation would need to show the DNR had jurisdiction over the subject-matter of the contested surface water right. The dispute would need to include an issue of water quantity. Consequently, a dispute directed to water quality, which is typically within the jurisdiction of IDEM, would not qualify. As is typical of

mediation, the mediator cannot impose a solution. Resolution is achieved only upon mutual consent of the participants. If the mediation succeeds, a binding agreement can be entered either privately among the participants or with a Commission endorsement. Atypical of mediation is that if the mediation fails, the administrative law judge dismisses the proceeding. The process anticipated by proposed 312 IAC § 11.8 is focused and designed to be efficient and of limited duration.

Mediation is not without costs. Human and financial resources are expended in any dispute resolution. Cost savings can be achieved through mediation as contrasted with litigation, although savings are not guaranteed and vary for each disputed proceeding. A successful mediation incorporates the needs of the parties, including both business and social. A party to a successful mediation avoids the unpredictable elements of litigation. The parties to mediation have ownership in the solution. Prompt dispute resolution can support job growth, economic development, and neighborhood harmony.

Yet the choice is not whether the Commission is to offer mediation services to help resolve surface water disputes. That choice was made by the Indiana General Assembly with the enactment of P.L. 151-2012. The choice for rule adoption is whether to provide direction and design for a mediation process or whether to leave an open-ended and indefinite process. The limited interest in IC § 14-25-1-8, before the 2012 amendments, suggests the remedy is unlikely to have frequent application going forward. But a quick, focused remedy may be a valuable tool for dispute resolution, particularly in times of stress associated with too little or too much surface water. Proposed 312 IAC § 11.8 appears to offer such a remedy. Final adoption of 312 IAC § 11.8 is recommended as published in the Indiana *Register* and attached in Exhibit A.

Dated: February 8, 2013

Stephen L. Lucas
Hearing Officer

TITLE 312 NATURAL RESOURCES COMMISSION

Final Rule
LSA Document #12-554(F)

DIGEST

Adds 312 IAC 11.8 to assist with implementing P.L.151-2012, which amended IC 14-25-1-8, concerning the use of mediation under IC 4-21.5-3.5 to resolve disputes between the users of surface water. Effective 30 days after filing with the Publisher.

312 IAC 11.8

SECTION 1. 312 IAC 11.8 IS ADDED TO READ AS FOLLOWS:

ARTICLE 11.8. SURFACE WATER DISPUTES MEDIATION

Rule 1. Administration and Implementation

312 IAC 11.8-1-1 Administration

Authority: IC 14-10-2-4; IC 14-25-1-8; IC 14-25-1-11
Affected: IC 4-21.5-3.5; IC 14-25-1

Sec. 1. (a) The commission's division of hearings shall administer and coordinate application of IC 4-21.5, including the use of mediation under IC 4-21.5-3.5 for a dispute that arises between the uses of surface water in a watershed area.

(b) The department's division of water shall administer and coordinate the professional and technical functions required of the department under IC 14-25-1 and this rule. The division of water may provide professional and technical assistance to parties to assist with achieving a resolution of a surface water dispute.
(Natural Resources Commission; 312 IAC 11.8-1-1)

312 IAC 11.8-1-2 Initiation of petition for mediation

Authority: IC 14-10-2-4; IC 14-25-1-8; IC 14-25-1-11
Affected: IC 14-25-1

Sec. 2. To seek mediation under IC 14-25-1-8 for a dispute between the users of surface water in a watershed area, an affected person must file a petition under this rule at the following address:

Division of Hearings

Natural Resources Commission

Indiana Government Center North

100 North Senate Avenue, Room N501

Indianapolis, IN 46204-2200

(Natural Resources Commission; 312 IAC 11.8-1-2)

312 IAC 11.8-1-3 Contents of petition for mediation

Authority: IC 14-10-2-4; IC 14-25-1-8; IC 14-25-1-11
Affected: IC 14; IC 36-9-27.4; IC 36-9-28.7

Sec. 3. A petition filed under section 2 of this rule must include the following information:

- (1) The location of the dispute, including reference to an affected watershed.**
- (2) Names and addresses of persons believed necessary to resolve the dispute.**
- (3) Identification of the harm caused by human activity that results from a change in surface water quantity.**
- (4) Except as provided in subdivision (5), citation to a statutory section or sections of IC 14-25 through IC 14-29 that places jurisdiction in the department over the subject matter of the dispute. The petition must specify how the section or sections would authorize relief from the harm asserted in subdivision (3).**
- (5) For mediation of a dispute arising under IC 14-26-2, 312 IAC 11 applies.**
- (6) A showing the petitioner does not have an adequate remedy under IC 36-9-27.4 or IC 36-9-28.7. The showing is not met if the petitioner sought but was denied relief on the merits.**

(Natural Resources Commission; 312 IAC 11.8-1-3)

312 IAC 11.8-1-4 Conduct of proceeding and mediation

Authority: IC 14-10-2-4; IC 14-25-1-8; IC 14-25-1-11

Affected: IC 4-21.5; IC 14-25-1

Sec. 4. (a) Following the receipt of a petition, an administrative law judge shall be appointed to conduct a proceeding under IC 4-21.5.

(b) As soon as practicable following appointment, the administrative law judge shall schedule a prehearing conference and notify each of the following:

- (1) The petitioner.**
- (2) Persons identified by the petitioner in section 3(2) of this rule.**
- (3) The department.**

(c) The administrative law judge shall conduct a preliminary hearing under IC 4-21.5-3-7(c) to determine whether the petition satisfies the requirements of section 3 of this rule. The preliminary hearing may be conducted in conjunction with the prehearing conference scheduled under subsection (b). The petitioner has the burden of going forward with the evidence. For purposes of the preliminary hearing, section 3 of this rule is satisfied if the evidence is viewed in the light most favorable to the petitioner. Following the hearing, the administrative law judge shall issue an order that includes a statement of the facts and law on which it is based. If the order denies the petition, the order shall be designated as a nonfinal order and is subject to IC 4-21.5-3-29.

(d) Each of the persons identified in subsection (b), and any other person identified and joined by the administrative law judge as a party needed for just adjudication, is a party to the proceeding.

(e) The parties may agree upon a person to serve as mediator. In the absence of an agreement, the administrative law judge shall seek to cause the appointment of a mediator who is qualified under IC 4-21.5-3.5.

(f) Following consultation with the parties and the conduct of any mediation, the mediator shall report to the administrative law judge either:

- (1) under IC 4-21.5-3.5-21; or**
- (2) the parties have settled.**

(g) If an agreement is not achieved following a reasonable opportunity to conduct mediation, the administrative law judge shall order the proceeding dismissed.

(h) The department is not required to attend a preliminary hearing or a mediation session. If the department attends a mediation session, the session shall be conducted in Marion County unless the department otherwise agrees.

(i) If an agreement is achieved, the parties may enter either of the following:

AGENDA ITEM #10

(1) A private agreement and request the administrative law judge to dismiss the proceeding. The parties may enter an agreement under this subdivision without participation by the department.

(2) A proposed agreed order for approval by the administrative law judge and the commission. An agreed order constitutes a final agency action by the commission, as well as a settlement among the parties.

(Natural Resources Commission; 312 IAC 11.8-1-4)